Nos. 910-913

In the Supreme Court of the United States

OCTOBER TERM, 1940

ABRAHAM S. STEINBERG, PETITIONER

v.

THE UNITED STATES OF AMERICA

ROBERT J. NEWMAN AND ROBERT T. HAINES, JR., PETITIONERS

v.

THE UNITED STATES OF AMERICA

HENRY J. MOLLER, PETITIONER

v.

THE UNITED STATES OF AMERICA

HERBERT W. WOLFINGER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ABRAHAM L. SHUSHAN, PETITIONER

v.

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v.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 4801–4822) is reported in 117 F. (2d) 110.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1941 (R. 4823), and petitions for rehearing (R. 4824–4859) were denied March 3, 1941 (R. 4860). The petitions for writs of certiorari were filed April 2, 1941.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Two questions are raised by all petitioners:

1. Whether a scheme to secure a contract with a Board of Levee Commissioners to conduct the refinancing of its obligations and to obtain the money of the Board as an excessive fee under the contract, employing to this end the corrupt participation of a member of the Board, the concealment of that participation, the willful misrepresentation of the savings effected and of the amount due as a fee, constitutes a scheme or artifice to defraud under the Mail Fraud Statute.

2. Whether, because of alleged extraordinary circumstances arising out of a state political campaign and the conduct of the prosecutor, petitioners were denied a fair trial.

In addition, petitioner Waguespack presents the following questions:

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[1] An "additional and supplemental petition" was filed on behalf of petitioner Harris on April 10, 1941.

3. Whether the selection pursuant to the Act of June 29, 1932, of two alternate jurors, who were excused before the case was submitted, deprived petitioner of his right to trial by a common-law jury of twelve.

4. Whether the admission in evidence of a certified copy of a federal income tax return to prove receipt of his part of the profits from the fraudulent scheme violated petitioner's constitutional rights against self-incrimination.

The petition of Newman and Harris also raises the following question:

5. Whether incriminating documents should have been excluded from evidence on the ground that they were seized by state officers under an allegedly invalid search warrant and turned over to the federal prosecutor, where it appears that the seizure was made to obtain evidence for a state court proceeding and without the knowledge or participation of the federal authorities.

Petitioner Miller also presents the following question:

6. Whether the jury should have been instructed to acquit him if they found that his participation in the fraudulent scheme charged was honestly based upon advice of counsel.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud,

> or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Louisiana on all but the fourth count of an indictment in eight counts (R. 103–130) charging violations of the Mail Fraud Statute. Each petitioner was sentenced to thirty months on each of the seven counts on which he was convicted, such sentences to run concurrently, and fined $1,000 on each of counts one and eight (R. 453–460). The Circuit Court of Appeals for the Fifth Circuit unanimously affirmed the judgments of conviction (R. 4801–4823). The case proved under the indictment may be briefly summarized as follows:

The Orleans Levee Board, an agency of the State of Louisiana, had outstanding a number of bond issues. On July 10, 1936, the Board ap-

proved a contract employing petitioners Newman and Harris, New Orleans bond dealers, as "fiscal advisers" to aid in refunding certain of these issues at lower rates of interest (R. 3032–3050). The contract provided that Newman and Harris should receive 25% of the "saving and gain" realized by the Board through the refunding (R. 3035). The bond dealers were to pay certain expenses and were to deposit 1% of the principal amount of bonds called for redemption at a given time as a guaranty of the sale of the new bonds and as compensation for any loss caused by the payment of premiums on the outstanding bonds (R. 3033–3035).

Previously, on June 11, 1936, Newman and Harris had entered into an agreement, not disclosed to the Levee Board, with petitioner Shushan. He was a former member (R. 2791) and President (R. 2796, 2812–2813) of the Levee Board and was considered influential with Governor Leche (R. 1845–1846). The agreement provided that Shushan would be an equal partner with them and that one-third of any profits realized by Shushan would be paid to petitioner Miller (R. 1215, 1216). Miller in turn made an arrangement with petitioner Waguespack, a member of the Levee Board and Chairman of its Finance Committee (R. 2803, 2839), whereby he agreed to give Waguespack 70% of any profits he might receive from Newman and Harris (R. 2144, 2155).

Waguespack participated actively in the meeting of the Levee Board which approved the contract with Newman and Harris (R. 3036–3050). He repeatedly asked Newman questions designed to bring out the advantages of the refunding proposal, made a motion for its acceptance and voted for it (R. 3050).[2] At this meeting Newman stated that he had taken up the proposal with the Governor and that he approved it (R. 3039–3040). Waguespack never disclosed his interest in the contract to any member of the Board (R. 1613, 1645, 1812, 2159). He justified his silence on the ground that the Board would unduly favor the contract if they knew he had an interest in it (R. 2159). Newman justified his failure to disclose Miller's interest to the Board on the ground that Miller was Shushan's partner and his failure to disclose Shushan's interest on the ground that the Board was not friendly to Shushan (R. 2361–2362). On other occasions Newman and Harris denied that they had any partners in the transaction (R. 1601, 2353).

Under the contract of July 10, 1936, Newman and Harris, in three transactions, caused the Levee Board to call for redemption bonds in the amount

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[2] In each refunding the necessary resolutions of the Levee Board were adopted upon motions of Waguespack (R. 3115, 3149, 3173, 3251, 3299, 3331, 3332–3337, 3356, 3383, 3391, 3398, 3399, 3400). He was similarly active in securing an extension of the Newman, Harris contract (R. 3229). His judgment was relied on by other Board members in all bond transactions (R. 1573).

of $5,485,000 and to issue new bonds at lower interest in an equivalent amount (R. 1204–1214).[3]

On October 7, 1936, Newman and Harris wrote a letter to the Levee Board explaining the method of computing "saving and gain" under the contract of July 10, 1936 (R. 3057–3060), a matter which the contract itself deliberately ignored (R. 2360–2361). The letter provided that the savings would be determined by deducting the aggregate amount of interest payable on the new bonds from the aggregate amount of interest payable on the old bonds, after making certain adjustments on account of premiums and the 1% deposit referred to above. This method was approved in a letter signed by the President Pro-Tem. of the Board (R. 245, 3061), after a stenographer had secured the approval of the Board members by telephoning (R. 1130, 1143–1145).

In bills submitted to the Board at the close of each refunding, Newman and Harris, using the method stated in their letter of October 7, 1936, computed the aggregate savings from all the refinancing to be $1,984,925.92 (R. 3423, 3474, 3524).

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[3] The bond dealers were aided by "unexpectedly favorable market conditions" (Shushan Pet. p. 5). The new bonds, in addition, were made virtually noncallable by the adoption of a call rate of 110, thus increasing the price of the bonds through the sacrifice of callability (R. 3068–3070). The use of split rates, suggested (Newman-Harris Pet. p. 8) as an innovation of Newman and Harris, was "very common" (R. 1665).

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On this basis they charged and received from the Board fees in the aggregate amount of $496,231.48 (R. 3428, 3478, 3527). After deduction of certain expenses (R. 3573), the fees were divided among petitioners as follows: Newman and Harris, $199,110.00; Shushan, $132,740.00; Miller, $19,911.00; and Waguespack, $46,459.01 (R. 3571, 3575, 3585, 3592).

Although all of the petitioners were in New Orleans, the distribution of their respective shares in the contract proceeds was effected through New York and Chicago banks. Newman and Harris paid Shusan and Miller by cashier's checks of a New York bank or by wire transfers (R. 2215, 3449, 3509, 3510, 3554–3557). Seventy percent of the share paid to Miller was in each case given by him to Waguespack in cash (R. 1944, 1947, 2008–2010, 2167–2169, 2214–2216) and was placed by Waguespack in his safety deposit box (R. 2167–2169, 214–2216).

From their gross fees Newman and Harris paid $12,340.00 to Charles S. Fitere, who was employed at a small salary by the Levee Board to keep newspaper clippings (R. 1131, 3600–3607). Shushan testified that he recommended Fitere to Newman and Harris, who wanted to employ someone in the Levee Board office to advise them about bond people coming there (R. 2043–2045, 2105). Newman stated that he and Harris employed Fitere as a spy to keep them advised of the operations of other bond houses at the Levee

Board (R. 1814, 1817). He testified that Fitere's fee was left to his sense of fair play and that he thought the amount demanded by Fitere was outrageous (R. 2386). The amounts he received were shown on the books of Newman and Harris as paid to "Fitere and others" (R. 3611, 3614, 3617).

Expert witnesses testified for the Government that, in order to determine the amounts actually saved by the Levee Board through any of the refinancing operations, it was necessary to discount such savings from the dates of prospective realization to the date of the refinancing at the rate of interest paid under the new issue, making adjustments for premiums paid on the old bonds and received on the new bonds (R. 1684–1690, 1709–1742). By this method they computed the aggregate savings of the Levee Board resulting from the refinancing to be in an amount slightly in excess of $542,000.00 (R. 1686, 1710). In all the refundings the new bonds matured at earlier dates than the old bonds; and Newman and Harris were paid upon the assumption that interest was "saved" through such shortening of maturities (R. 1699–1700). On this basis the Board might have retired all its bonds within a year and thus "save" all future interest (R. 1700). Because of the earlier maturities of the new bonds the fee paid Newman and Harris in one refunding exceeded the savings of the Board by

$96,000.00 (R. 1702). Because of the large fees paid to Newman and Harris and other expenses incident to the refinancing, the Board's cash position will until 1963 be less favorable than if there had been no refinancing (R. 1687–1689, 3647–3648).

Dealers in municipal bonds testified that the Newman, Harris contract was unique; that bankers generally give free advice to municipalities in refunding operations; and that, where they are paid, they receive a fixed fee equal to a small percentage of the face amount of the bonds (R. 1660–1678, 2238–2246, 2388–2413, 2420–2434, 2448–2460). There was testimony that bankers use the method of computation employed by Newman and Harris for the purpose of determining the lowest bid on bonds and in statements showing the benefits from refunding, but no witness knew personally of any instance in which this method had been used to compute a fee as in the present case (R. 2246, 2405–2406, 2449).

As bearing on the question of the intent of Shushan and Waguespack, evidence of the so-called O'Neil transaction was admitted solely as against these petitioners (R. 1817–1818). In April 1936 the Levee Board proposed to issue certain refunding bonds, the details of the transaction being handled by Waguespack (R. 1818–1823). A syndicate of bond dealers headed by one Donald O'Neil (R. 1819) agreed with Waguespack

that the Board would advertise 5% callable bonds, that the syndicate would bid par for the bonds, and that if the syndicate should acquire them, Waguespack would recommend to the Board that they be exchanged for 4¾% noncallable bonds, which were more valuable (R. 1823–1826). During the negotiations O'Neil was introduced by Waguespack to Shushan (R. 1824), O'Neil understanding that it was good policy to see Shushan and that if Shushan opposed a transaction with the Levee Board there would be trouble getting it through (R. 1845–1846). Upon the consummation of this transaction O'Neil paid $27,000 as a so-called "finders fee" to another firm of bond dealers, Sutherlin and Scranton (R. 1829–1830, 1836). This money was used to purchase two cashier's checks from the Republic Bank of Dallas, one payable to Shushan for $17,500, and the other payable to Waguespack for $9,500 (R. 3963–3964). Waguespack cashed his check in Dallas and put the money in his bank box in New Orleans (R. 1830–1831, 2164–2165).

The mailings alleged and admittedly proved furthered the refinancing, in some instances, and, in others, the disposition of the fees obtained.

ARGUMENT

I

The scheme alleged and proved had for its object to secure a contract with the Levee Board to con-

duct the refinancing of its obligations and to obtain the money of the Board as an excessive fee under the contract. The fraudulent means used involved the corrupt participation in the scheme of a member of the Board who was active in gaining approval for the project and payments, the concealment of that participation, the payment of large sums to an employee of the Board, supposedly to act as a "spy", the exercise of improper influence upon the Governor, and, finally, misrepresentation of the savings effected by the refinancing and of the amount due as a fee. The Circuit Court of Appeals held that such a conspiracy is "a scheme or artifice to defraud" within the meaning of the statute (R. 4807) and that the evidence sufficed to make a case for the jury as to whether there was such a scheme to defraud (R. 4821–4822).

1. Petitioners argued below that the representation as to the savings effected and the amount of the fees due was "but an honest interpretation of the contract in accord with the practice of bondholders." In reply the court said (R. 4821–4822):

> Under all the testimony the settlements thus figured seem to us so exorbitant and unreasonable as to indicate fraud or mistake in a civil proceeding. Yet we should hesitate to rest a criminal conviction for fraud on it alone. When taken, however, in connection with Waguespack's official position and conduct and the other facts we have set out to-

> gether with the rest of the evidence, which we have been unable to set forth completely and in detail, we think it was clearly a jury question whether this was a scheme to defraud, and whether each defendant was a party to it.

In reliance upon this statement in the opinion, petitioners contend that the Circuit Court of Appeals discarded the false representations as a basis for sustaining the convictions, and rested on bribery alone. The contention misconstrues the opinion. Whatever its further legal significance, Waguespack's corrupt connection with the plan, like the influence exerted by Shushan, the secret arrangement with Fitere, and the devious distribution of the proceeds serves to refute the defense that the misrepresentation of the savings effected was honestly made. Apart from its evidential significance with regard to the claim of honest mistake, the secret participation of Waguespack involved the concealment of a fact which was obviously material to the other members of the Board and in that respect presented an additional false representation. Cf. *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *United States* v. *Brown,* 79 F. (2d) 321, 325 (C. C. A. 2d), certiorari denied, 296 U. S. 650; *Campbell* v. *United States,* 12 F. (2d) 873, 876 (C. C. A. 9th); see also *Rex* v. *Kylsant* [1932], 1 K. B. 442.

2. The trial court charged "that secret arrangements with a public official by which he knowingly shares in profits on contracts which he has a voice in awarding, makes such contracts fraudulent; and, whoever knowingly and wilfully receives benefits under such contracts defrauds the public body which granted them unless you find that such public official acted honestly and in good faith" (R. 2752). There was no exception to this statement in the charge, it was not assigned as error in the Circuit Court of Appeals and it is not referred to in the petitions for certiorari. If the question—whether a scheme to obtain public money by corrupting a public official constitutes a scheme to defraud—is an issue in the case, we think it clear that the issue arises only by virtue of this instruction.[4] Assuming that the validity of the instruction is open to

[4] The Circuit Court of Appeals in discussing the validity of the indictment said: "A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud though no lies were told. A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public" (R. 4806). But the conclusion of the court was that the indictment alleged "a scheme to defraud by corrupting an official *and also* by misrepresentation of results achieved" (R. 4807). As we have shown above, the court did not discard the false representations as a basis for sustaining the convictions. Hence it is only in the charge of the trial court that there was an operative affirmation of the sufficiency of a scheme to corrupt, standing alone. And that statement, as we have said, petitioners did not challenge.

challenge in this Court, in spite of the absence of an objection, we do not hesitate to urge that obtaining money by the wilful corruption of a fiduciary inevitably involves a fraud within the meaning of the statute (cf. *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5th), certiorari denied, 311 U. S., pt. 1, p. xxiii), which covers a broader ground than the ancient crime of false pretenses. See Hough, J., in *Bentel* v. *United States,* 13 F. (2d) 327 (C. C. A. 2d), certiorari denied *sub nom., Amos* v. *United States,* 273 U. S. 713; L. Hand, J., in *United States* v. *Rowe,* 56 F. (2d) 747 (C. C. A. 2d), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co., Inc.,* v. *United States,* 13 F. (2d) 544 (C. C. A. 2d), certiorari denied, 273 U. S. 729. Indeed, the statute speaks of "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations or promises." There would be no point in the disjunctive if false representations measured the full scope of fraud.

That corruption of a fiduciary is a fraud has been held by this Court with respect to the scope of Section 37 of the Criminal Code (*Crawford* v. *United States,* 212 U. S. 183; see also, *United States* v. *Manton,* 107 F. (2d) 834 (C. C. A. 2d), certiorari denied, 309 U. S. 664) as well as in numerous cases involving the civil remedies for fraud (*United States* v. *Carter,* 217 U. S. 286; *Crocker* v. *United States,* 240 U. S. 74; *Pan American Petroleum & T. Co.* v. *United States,* 273 U. S. 456). As was said

in *Bentel* v. *United States, supra,* at p. 329: "The measure or rule for what is evidence of the ultimate fact does not change in moving from the civil to the criminal side of the court; only the necessary quantum of probative force changes." See also *Foshay* v. *United States,* 68 F. (2d) 205, 221 (C. C. A. 8th), certiorari denied, 291 U. S. 674; *United States* v. *Buckner, supra,* at 926; *United States* v. *Brown,* 79 F. (2d) 321, 325 (C. C. A. 2d), certiorari denied *sub nom., McCarthy* v. *United States,* 296 U. S. 650). Petitioners point to no authority to the contrary, under the Mail Fraud Statute. Neither *Fasulo* v. *United States,* 272 U. S. 620, involving threats—traditionally distinguishable from fraud—nor *Hammerschmidt* v. *United States,* 265 U. S. 182, involving open defiance of a federal statute under Section 37 of the Criminal Code, is remotely in point. While the question was expressly left open in *Hass* v. *United States,* 93 F. (2d) 427, 435 (C. C. A. 8th), with decision turning on another ground, we do not think it is genuinely debatable or that it would call for review by this Court in the absence of a conflict on the precise issue, which concededly does not exist.

3. From the assumptions that the trial court charged that the representation as to the savings effected was sufficient in itself for conviction, and that the Circuit Court of Appeals held to the contrary, petitioners Harris and Newman also argue (Pet. 44–49) that the jury may have based its verdict on an untenable ground, with the result that

they are entitled to a reversal under the doctrine of *Nash* v. *United States,* 229 U. S. 373. Both assumptions are unfounded. The Circuit Court of Appeals, as we have shown, did not hold the false representations insufficient; it emphasized the corruption of Waguespack as a factor supporting their sufficiency, as well as an element of importance in itself. The trial court's charge rested, in its major impact, upon the theory that the indictment as a whole alleged a scheme to defraud within the meaning of the statute. The jury was specifically instructed that in order to convict it must find that the scheme existed substantially as alleged (R. 2753, 2754, 2756, 2759), that the defendants were parties to it and that they did not act in good faith (R. 2752–2753). Nothing in the charge instructed the jury that a conviction would be proper if Waguespack's corrupt participation was not established as a part of the scheme. Given his corrupt participation, there is neither ambiguity as to the basis of conviction nor doubt that, on any theory, the scheme was one to defraud.

Nash v. *United States, supra,* is clearly not in point since there the jury was explicitly permitted to convict upon separate charges some of which had been abandoned or were insufficient in law.

4. Petitioners Newman and Harris intimate, though they do not argue, that the evidence was insufficient to show participation by them in the corruption of Waguespack. Without reciting the evidence in detail, we think it enough to say in

reply that Newman and Harris knew that a plan which permitted them to receive $496,231.00 out of the $542,000.00 actual savings to the Board, as compensation for effecting the refinancing, would, if approved, result in a palpable fraud. Since it was necessary for the proposal to be approved by the Board against its own interest, they knew as well as any of the others that the approval could be obtained only by corrupt means. They were in communication with Waguespack. They knew that he zealously advocated the scheme and carried the burden of obtaining the approval of the rest of the Board. The inescapable inference is that if they did not personally participate in making the arrangement with Waguespack, they knew that it had been made.[5] On this basis alone we think it undeniable that the evidence was sufficient to permit the jury to find that the part which Newman and Harris played in the scheme as a whole was not divorced from the corruption of Waguespack.

5. Similarly, there is no merit to the contention advanced by petitioner Harris in his supplemental petition that the use of the mails was not "in

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[5] Moreover, it was unnecessary that Newman and Harris know the precise method employed to corrupt Waguespack; it was sufficient if they knew that corruption was included in the purpose of the scheme as a whole. *Marino* v. *United States*, 91 F. (2d) 691, 696 (C. C. A. 9th), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9th), certiorari denied, 298 U. S. 690; *Busch* v. *United States*, 52 F. (2d) 79, 82 (C. C. A. 8th).

furtherance of the alleged scheme to defraud." The mailings all were related either to the refinancing itself or to secret disposition of the proceeds of the scheme. No argument is needed to show that they were made "for the purpose of executing" the scheme. The contention that they were not rests ultimately on the ground that neither the refinancing nor the receipt of the fees was a part of a scheme to defraud. That position, as we have previously shown, is unsound.

II

Petitioners assert that they were denied a fair trial because of the overruling of their motions for continuances and for a mistrial, and because of the conduct of the prosecutor, not only in prosecuting the case, but also in allegedly cooperating with certain newspapers in creating prejudicial publicity against petitioners (Newman-Harris, Pet. 49–54; Miller, Pet. 11–14; Waguespack, Pet. 21–23; Shushan, Pet. 17–38).

The rather intemperate attacks made by petitioners upon the conduct and the subjective intentions of the Assistant Attorney General in his public utterances and relations to the press are unwarranted.[6] We think it is plain, in any event,

[6] First, we wish emphatically to deny the unsupported charges (Shushan Pet. 19–20, 22–23) that some of the Government's investigations were not commenced or conducted in good faith, or that the Government prosecutors deliberately persecuted the defendants in the press. Second, it may be that the Assistant Attorney General should have been more reticent or evasive in his public statements con-

that the incidents complained of resulted in no substantial prejudice to petitioners. We can agree that the interest of the local press in the investigation and indictment was unfortunately excessive, if inevitable. But, as the court below points out (R. 4808), the matters complained of occurred prior to the trial, and the trial judge, a resident of New Orleans and personally aware of the tensions in the local atmosphere, took all necessary steps to secure an impartial jury. *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5th), certiorari denied, 311 U. S., pt. 1, p. xxiii; *Allen* v. *United States,* 4 F. (2d) 688 (C. C. A. 7th), certiorari denied *sub nom., Hunter* v. *United States,* 267 U. S. 597; *Kelly* v. *United States,* 258 Fed. 392 (C. C. A. 6th); *Lias* v. *United States,* 51 F. (2d) 215 (C. C. A. 4th); *Centoni* v. *United States,* 69 F.

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firming the common knowledge of the occasion of his presence and with respect to the subject matter of his investigations, but this raises a delicate issue of public policy which hardly can be explored in the appellate courts. It is, in any event, patently unfair to attribute to the prosecution all of the newspaper publicity in a matter of such large public interest. Third, the specific incidents shown in the record are, for the most part, easily explicable. For example, the publication of the prosecutor's photograph with bullets mailed to him anonymously with the warning to discontinue the investigation of the 1935 Shushan jury, was a normal consequence of the receipt of such a threat. The charge that he ridiculed in the press petitioners' applications for continuances (Newman-Harris Pet. 28) is grossly misleading. The article in the press was an accurate report of the proper argument of the prosecuting attorney in open court in opposing the motions for a continuance. (See Shushan Pet. 30.)

(2d) 624 (C. C. A. 9th). As this Court has said, reliance must be had upon "the learning, good sense, fairness and courage of federal trial judges". *United States* v. *Nardone,* 308 U. S. 338, 342.

The jurors were fully examined on their voir dire to determine whether they had any political connections (R. 960, 967, 973, 983), and whether they had read anything about the case in the newspapers from which they had formed opinions concerning the guilt of the defendants (R. 974, 975, 980). It is true, as petitioners state (Newman-Harris, Pet. 28), that some of the talesmen had formed opinions about the case. But they were promptly excused by the court (R. 966, 974, 992, 997, 1003). Petitioners felt required to use only seven of their ten peremptory challenges (R. 958–1013). See *Hartzell* v. *United States,* 72 F. (2d) 569, 577 (C. C. A. 8th), certiorari denied, 293 U. S. 621.

Throughout the trial, which was conducted with scrupulous fairness, the proceedings were carefully guarded in the interests of the petitioners. Though petitioners now point out that the jury was not locked up (Newman-Harris, Pet. 52), this course was presumably followed with the consent or agreement of their counsel since they failed to request that this be done. The jurors were admonished each day not to read newspaper accounts, nor listen to radio comments concerning the trial, and not to discuss the case with anyone (R. 339, 349, 357–363, 375, 1344). See *Hart* v.

United States, supra. It must be assumed that they obeyed these instructions. *United States* v. *Rice,* 195 Fed. 171 (S. D., N. Y.); *United States* v. *Rollnick,* 91 F. (2d) 911 (C. C. A. 2d); *Coplin* v. *United States,* 88 F. (2d) 652 (C. C. A. 9th).

Petitioners complain of two allegedly prejudicial matters published during the trial (Newman-Harris Pet. 28–29). The complaint is groundless in the absence of any showing that either matter was read by any juror. *Klose* v. *United States,* 49 F. (2d) 177 (C. C. A. 8th). See *Paschen* v. *United States,* 70 F. (2d) 491 (C. C. A. 7th). In the second instance, on the defendants' motion for a mistrial, the jurors were polled and each of them stated that he had not read the article (R. 1308–1310).

The statement of the Assistant Attorney General that he believed the defendants guilty (Newman-Harris Pet. 30), was improper, but it was adequately corrected by the trial judge (R. 2507); and it was only a brief incident in a long argument, which, when viewed as a whole, was entirely fair.[7] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150.

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[7] Similarly, the petitioners Newman and Harris (Pet. 30) object that the argument of the Assistant Attorney General linked them to the O'Neill deal (R. 2572–2573). This inadvertence was not objected to and was cured by the charge which, in spite of petitioners' implication, specifically directed the jury to limit that transaction to Shushan and Waguespack (R. 2734).

Petitioners suggest that the interest of the Government would not have been prejudiced by a six weeks' continuance (Newman-Harris, Pet. 51). However, there was not only a primary election in January 1941, but a run-off election in February 1941. Certainly continuances until a "reasonable time" (Shushan, Pet. 29) after the February election would have been requested had the trial date been postponed. And "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States,* 309 U. S. 323, 325 (1940). The trial judge cannot be said to have abused his discretion in denying the motions.

III

Petitioner Waguespack contends (Pet. 16–20) that the selection of two alternate jurors was error and that the Act of June 29, 1932, c. 309, 47 Stat. 380, U. S. C., Title 28, Sec. 417a, violates the constitutional right to be tried by a common-law jury of twelve. Since the alternate jurors were excused prior to submission and presumably obeyed the instruction of the trial judge not to discuss the case with the other jurors (R. 339, 341, 342, 344–349, 357–363), the court below concluded that "no harm was done" and refused to examine the constitutional question (R. 4809). The decision was clearly right under the elementary rule that one who attacks a statute must show that the alleged unconstitutional feature injures him. *Heald* v. *District of Columbia,* 259 U. S. 114, 123.

There can, moreover, be no serious doubt as to the constitutionality of the statute. Nothing in the Constitution prevents a modification of the jury system so long as its essential characteristics are preserved. *United States* v. *Wood,* 299 U. S. 123, 141–147; *Patton* v. *United States,* 281 U. S. 276. Many of the states with constitutional guarantees identical with the Federal Constitution have adopted similar statutes which have in every instance been held valid. *People* v. *Peete,* 54 Cal. App. 333; *State* v. *Dalton,* 206 N. C. 507; *People* v. *Mitchell,* 266 N. Y. 15; *State* v. *Dolbow,* 117 N. J. L. 560; *Commonwealth* v. *Fugmann,* 330 Pa. 4.

IV

Petitioner Waguespack's contention (Pet. 11–16) that his constitutional rights were invaded by the introduction in evidence against him of a certified copy of his income-tax return was adequately disposed of by the court below (R. 4811–4812) on the ground that he was in no position to raise the point. As that court properly held, petitioner could avail himself of his privilege of not furnishing incriminating testimony only by refusing to furnish it at the proper time, i. e., when the tax return was filed. Cf. *United States* v. *Sullivan,* 274 U. S. 259. If not raised at the proper time, such a privilege is deemed to have been waived. *Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103, 112–113. It may be true, as petitioner points out (Waguespack pet. 14), that if he asserts the privilege by refusing to report

his income he commits a violation of the revenue laws. *Scelera sceleribus tuenda.* Having included the information in his income-tax return, there was no further privilege to preclude the use of the return or its contents against him (see ***Ryan*** v. ***Amazon Petroleum Corporation,*** 71 F. (2d) 1, 8 (C. C. A. 5th), reversed on another ground in ***Panama Refining Co.*** v. ***Ryan,*** 293 U. S. 388) and its introduction in evidence did not violate the self-incrimination provision of the Fifth Amendment. "A party is privileged from producing the evidence but not from its production." ***Johnson*** v. ***United States,*** 228 U. S. 457, 458.

V

Petitioners Newman and Harris contend (Pet. 55–60) that the trial court erred in overruling their objection to the admission in evidence of documents seized from them by state authorities pursuant to a search warrant, which they assert is illegal, issued by a Louisiana State court. The documents consisted of the contract between petitioners and the Levee District and various checks and communications pertaining thereto.[8] (See R. 1095.) As the court below observed, "they show

[8] Exhibits G–27, R. 1216, 3031; G–29, R. 3032–3036; G–32, 3060–3061; G–105–A, R. 3492–3497; G–116; R. 3513; G–119, R. 3517; G–128, R. 3528–3529; G–133–A, R. 3538–3541; G–145, R. 3555; G–147, R. 3557; G–150, R. 3561; G–153, R. 3564; G–155, R. 3566; G–156, R. 3567; G–162, R. 3600; G–163, R. 3600; G–165, R. 3608.

nothing more than Newman & Harris admit to be true" (R. 4811).

Petitioners' contention is without merit, for as the Circuit Court of Appeals held (R. 4810–4811), it is a well settled rule that in the absence of any federal cooperation, evidence obtained by state officers under an invalid search warrant is admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Weeks* v. *United States,* 232 U. S. 383, 398; *Edgemon* v. *United States,* 87 F. (2d) 13, 15 (C. C. A. 10th); *In re Milburne,* 77 F. (2d) 310, 311 (C. C. A. 2d); *Miller* v. *United States,* 50 F. (2d) 505, 507–508 (C. C. A. 3d), certiorari denied, 284 U. S. 651; *Vollmer* v. *United States,* 2 F. (2d) 551, 552 (C. C. A. 5th). See also *McGuire* v. *United States,* 273 U. S. 95, 99; *Center* v. *United States,* 267 U. S. 575.

That there was no cooperation between federal and state officers here is plain. The state district attorney testified that he filed the affidavit upon which the search warrant was issued in the course of his own independent investigation into bribery charges growing out of the refunding transaction between the Levee Board and petitioners (R. 1082–1084). The investigation was begun as a result of evidence furnished him by the State Audit Department, and, he added, the United States Attorney or any one representing him "had nothing to do with the matter at all" (R. 1082–1084, 1089). The officers who made the search similarly testified that it was not made at the request of the United

States Attorney or anyone in the employ of the federal government, and that no federal officer was present when the search was made (R. 1090–1098). An Assistant United States Attorney testified that he first learned of the search and seizure through the newspapers and that "some days after" the United States Attorney's office "became interested in finding out whether there was anything obtained as a result of the search that might help us" (R. 1098–1102, 1100). None of this testimony was contradicted by petitioners.[9]

In view of this unequivocal showing of non-cooperation between the state and federal officers, it is apparent that neither *Gambino* v. *United States,* 275 U. S. 310, nor *Sutherland* v. *United States,* 92 F. (2d) 305 (C. C. A. 4th), relied upon by petitioners, are in point, for in each of those cases there was an understanding between the state

[9] Petitioners point (Newman-Harris Pet. 56) to the general statement made by the district attorney that he had exchanged information with the United States Attorney but fail to add that he also said, "but prior to this search and seizure there was no suggestion on the part of the government that we make a search, none at all" (R. 1089). Similarly, when petitioners point to the testimony of the assistant district attorney with reference to making the papers available in connection with the present case, they fail to state that the witness had already explained, in reply to the preceding question, that his office did not advise the federal prosecutor until after the search and seizure (R. 1098). Again, they attach significance to the presence of an assistant United States Attorney in the office of the State District Attorney on the day of the seizure but ignore the emphatic testimony that this was wholly unrelated to the seizure (R. 1089).

and federal officers that the latter would prosecute on the basis of the seized evidence.

VI

Petitioner Miller complains of the refusal of the trial court to instruct the jury to acquit him if they found that he had honestly participated in the fraudulent scheme upon the advice of Wagues-pack, who was his attorney. (Miller Pet. 7–10.) But it is elementary that the advice of counsel, even if honestly followed, is merely a circumstance which the jury may consider in determining intent and good faith. See *Hersh* v. *United States,* 68 F. (2d) 799, 806 (C. C. A. 9th); *Murdock* v. *United States,* 62 F. (2d) 926, 928 (C. C. A. 7th); *Miller* v. *United States,* 277 Fed. 721, 726 (C. C. A. 4th).

Petitioner states that his proposed instruction was modeled from *Williamson* v. *United States,* 207 U. S. 425, 453, but in that case the charge stated that "no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel"—a qualification which petitioner's requested charge omits.

The general charge explicitly and adequately covered the question of good faith and protected Miller from being convicted if the jury found that his acts were innocent and committed without wrongful intent (R. 2739–2740, 2741, 2752–2753, 2756, 2760, 2761). And, in any event, it seems plain, as the court below pointed out (R. 4814),

that Waguespack acted as Miller's partner rather than as his attorney, and that any legal research he may have made was directed towards ascertaining whether he himself would violate state laws if he joined Miller's enterprise (R. 1918–1923, 1963–1964, 1968–1978, 1986).

CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1940.

ABRAHAM L. SHUSHAN, Petitioner,

versus

UNITED STATES OF AMERICA,

FIRST SUPPLEMENTAL BRIEF OF ABRAHAM L. SHUSHAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Certain incorrect statements, which might have a very prejudicial effect against petitioner, are included in the Brief for the United States in Opposition. We desire to point out, and endeavor to correct, these statements.

1.

On page 5, the government's brief says:—

> "Previously, on June 11, 1936, Newman and Harris had entered into an agreement, not disclosed to the Levee Board, with petitioner Shushan. He was a former member (R. 2791) and President (R. 2796, 2812-2813) of the Levee Board and was considered influential with Governor Leche (R. 1845-1846)."

This is an echo of the persistent and unjustified disposition of the government attorneys to seek to link the petitioner Shushan in the case with the then governor of Louisiana, Leche. In the absence of any other evidence to connect Shushan with either (1) the alleged bribery of levee board member Waguespack, or (2) the manner of the computation, by Newman and Harris, of the fee, the two elements of fraud relied on by the prosecution, the government attorneys keep trying to tie Shushan in with some thought of undue political influence in the matter exercised by him on Leche. There is not a scrap of such proof in the record. One lone telegram, in a routine matter, long after the contract had been obtained and was being performed by Newman, Harris & Company, failed to supply, even by inference, any influencing of Leche by Shushan. Now the gratuitous statement is made in the brief: "(Shushan) was considered influential with Governor Leche", and pages 1845-1846 of the transcript are referred to. These pages embrace testimony in which neither Leche, nor any question of Shushan's influence with Leche, are even mentioned. The page reference, in such a connection, is untrue and mis-leading. The testimony, as to an opinion regarding possible power of opposition by Shushan in a Levee Board transaction, was, admittedly, of an "impression" founded on rank generality of hearsay, and should never have been allowed; but, even as admitted, it made no such reference as is here attributed to it in the government's brief.

2.

On page 11, the government's brief says:

> "During the negotiations O'Neil was introduced by Waguespack to Shushan (R. 1824), O'Neil understanding that it was good policy to

see Shushan and that if Shushan opposed a transaction with the Levee Board there would be trouble getting it through (R. 1845-1846)."

This is a more accurately stated reference to O'Neil's testimony on pages 1845-1846 of the transcript. However, it is still grossly unfair for the government to assume the truth of O'Neil's evidence, and ignore the fact that O'Neil fixed the only dates when he was in New Orleans and could have visited Shushan with Waguespack, as he described; and undisputable records proved Shushan was in New York city on one date and confined in a hospital by illness on the other date (Tr. pp. 2066, 2122 to 2128). O'Neil, for some reason, was an overly-eager government witness in purpose to link petitioner Shushan and co-defendant Waguespack together by this alleged visit, which was impossible of having happened as he testified it did happen. He was also eager to volunteer his "impression", as he testified, or his "understanding", as the government's brief calls it, of Shushan's power of opposition to a Levee Board transaction. Despite the fact that the record, as a whole, shows O'Neil's testimony was thoroughly unreliable, the government now adopts his statement as an established fact and fails to tell your Honors how his statement was otherwise completely discredited.

3.

On page 12, the government's brief says:—

"The fraudulent means used involved the corrupt participation in the scheme of a member of the Board who was active in gaining approval for the project and payments, the concealment of that participation, the payment of large sums to an employee of the Board, supposedly to act as a 'spy', the exercise of improper influence upon the

> Governor, and, finally, misrepresentation of the savings effected by the refinancing and of the amount due as a fee."

Again, the government refers to "improper influence upon the Governor" (meaning Leche), and if your Honors will read the record through, from cover to cover, you will not find the slightest proof of any influence exerted upon Governor Leche in connection with this refunding contract, certainly not by petitioner Shushan, and we know of none from the transcript by anybody else. This is a persistent fiction by the government attorneys to try to argue that Shushan had some place in the alleged fraudulent plan, since the prosecution had failed to prove his connection with either the fee computation or the alleged Waguespack bribe.

4.

On page 13, the government's brief says:—

> "Whatever its further legal significance, Waguespack's corrupt connection with the plan, like the influence exerted by Shushan, the secret arrangement with Fitere, and the devious distribution of the proceeds serves to refute the defense that the misrepresentation of the savings effected was honestly made."

Without again repeating what we have twice already said, we simply comment that there is not a scrap of evidence in the whole case that Shushan exerted any influence on anybody in connection with this refunding contract. None was shown to have been exerted on Governor Leche; he was called as a witness by the prosecution and not used. Every levee board member placed on the stand

declared that Shushan had never made the slightest approach to them on the subject.

5.

On page 23, the government's brief says:—

> "Petitioners suggest that the interest of the Government would not have been prejudiced by a six weeks' continuance (Newman-Harris, Pet. 51). However, there was not only a primary election in January 1941, but a run-off election in February 1941."

This is an unfair argument to advance. Neither Shushan, the prosecuting attorneys, or the trial judge knew, in November, 1939, when the continuance was sought, that there would be a second primary. The legal situation was determined then as it then appeared. We were asking not to be tried until men's political passions, fanned by the unholy combine between press and prosecutor for election purposes, had been given time to cool. Whether beyond a first primary, or a possible second primary, the necessity to accomplish due process to the accused should have been the paramount consideration.

CONCLUSION

We re-affirm the conclusion of our previous brief that the circumstances of the alleged bribery of Waguespack, and the manner of the fee computation of Newman and Harris, did not present a case within the intendment of the mail fraud law; that, particularly, Shushan had no complicity in either of these matters, under all of the evidence, and should have been dismissed from the case; that his conviction was obtained by public preju-

dice improperly created against him by the Assistant Attorney General, in collaboration with the newspapers, and that his trial on the eve of an election, under such conditions, lacked due process in the true meaning of that clause of the United States Constitution.

Respectfully submitted,

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